

AMENDED IN ASSEMBLY APRIL 25, 1996

CALIFORNIA LEGISLATURE—1995–96 REGULAR SESSION

**ASSEMBLY BILL**

**No. 2585**

**Introduced by Assembly Member Kuykendall**

February 21, 1996

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~~An act to amend Section 2856 of the Civil Code, relating to guarantors. An act to repeal and add Section 2856 of the Civil Code, and to amend Section 580a of the Code of Civil Procedure, relating to sureties.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 2585, as amended, Kuykendall. Guarantors.

(1) Existing law provides that ~~a guarantor may waive its rights of subrogation and reimbursement and any other rights and defenses, as specified.~~

~~This bill would make a technical, nonsubstantive change to this provision any guarantor, including a guarantor of an obligation secured by real property or any interest therein, may waive the guarantor's rights of subrogation and reimbursement and any other rights and defenses available to the guarantor by reason of specified provisions of existing law.~~

~~Existing law provides that specified waivers shall not apply to a guaranty of a loan to an individual primarily for personal, family, or household purposes, secured by deed of trust or mortgage or a specified dwelling occupied by the borrower.~~

~~This bill would revise and recast these provisions to provide that a guarantor or other surety, including a guarantor of a note or other obligation secured by real property or an estate~~

for years, may waive any or all of specified rights and defenses, as specified. It would also provide that specified waivers shall not apply to a guaranty or other type of suretyship obligation made in respect of a loan secured by deed of trust or mortgage on a specified dwelling if the loan was used to pay all or part of the purchase price of the dwelling. The bill also would state legislative intent in this regard.

Existing law specifies certain procedures for a complaint that seeks a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of note upon real property or any interest therein was given.

This bill would instead apply these procedures to a complaint that seeks a money judgment for the balance due upon a note secured by a deed of trust or mortgage with power of sale upon real property or an estate for years.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

*The people of the State of California do enact as follows:*

1    ~~SECTION 1. Section 2856 of the Civil Code is~~  
2    ~~SECTION 1. Section 2856 of the Civil Code is~~  
3    ~~repealed.~~  
4    ~~2856. (a) Any guarantor, including a guarantor of an~~  
5    ~~obligation secured by real property or any interest~~  
6    ~~therein, may waive the guarantor's rights of subrogation~~  
7    ~~and reimbursement and any other rights and defenses~~  
8    ~~available to the guarantor by reason of Sections 2787 to~~  
9    ~~2855, inclusive, including, without limitation, (1) any~~  
10    ~~defenses the guarantor may have to the guaranty~~  
11    ~~obligation by reason of an election of remedies by the~~  
12    ~~creditor and (2) any rights or defenses the guarantor may~~  
13    ~~have by reason of protection afforded to the principal~~  
14    ~~with respect to the obligation so guaranteed pursuant to~~  
15    ~~the antideficiency or other laws of this state limiting or~~  
16    ~~discharging the principal's indebtedness, including,~~  
17    ~~without limitation, Section 580a, 580b, 580d, or 726 of the~~  
18    ~~Code of Civil Procedure.~~

~~(b) Any language that expressly sets forth a waiver of suretyship rights or defenses described in subdivision (a), or any of them, shall be effective whether or not it contains references to statutory provisions or judicial decisions. The following language shall be an effective waiver of the guarantor's defense to a recovery by the creditor by reason of the creditor's election of remedies:~~

~~Guarantor waives all rights and defenses arising out of an election of remedies by the creditor, even though that election of remedies, such as a nonjudicial foreclosure with respect to security for a guaranteed obligation, has destroyed the guarantor's rights of subrogation and reimbursement against the principal by the operation of Section 580d of the Code of Civil Procedure or otherwise.~~

~~(c) Subdivision (b) shall not apply to a guaranty of a loan to an individual primarily for personal, family, or household purposes, secured by a deed of trust or mortgage on a dwelling for not more than four families when the dwelling is occupied, entirely or in part, by the borrower.~~

*SEC. 2. Section 2856 is added to the Civil Code, to read:*

*2856. (a) Any guarantor or other surety, including a guarantor of a note or other obligation secured by real property or an estate for years, may waive any or all of the following:*

*(1) The guarantor or other surety's rights of subrogation, reimbursement, indemnification, and contribution and any other rights and defenses that are or may become available to the guarantor or other surety by reason of Sections 2787 to 2855, inclusive.*

*(2) Any rights or defenses the guarantor or other surety may have in respect of his or her obligations as a guarantor or other surety by reason of any election of remedies by the creditor.*

*(3) Any rights or defenses the guarantor or other surety may have because the principal's note or other obligation is secured by real property or an estate for years. These rights or defenses include, but are not limited to, any rights or defenses that are based upon,*

1 *directly or indirectly, the application of Section 580a,*  
2 *580b, 580d, or 726 of the Code of Civil Procedure to the*  
3 *principal's note or other obligation.*

4 *(b) A contractual provision that expresses an intent to*  
5 *waive any or all of the rights and defenses described in*  
6 *subdivision (a), shall be effective to waive these rights*  
7 *and defenses without regard to the inclusion of any*  
8 *particular language or phrases in the contract to waive*  
9 *any rights and defenses or any references to statutory*  
10 *provisions or judicial decisions.*

11 *(c) Without limiting any rights of the creditor or any*  
12 *guarantor or other surety to use any other language to*  
13 *express an intent to waive any or all of the rights and*  
14 *defenses described in paragraphs (2) and (3) of*  
15 *subdivision (a), the following provisions in a contract*  
16 *shall effectively waive all rights and defenses described in*  
17 *subdivision (a):*

18  
19 *The surety irrevocably and unconditionally waives*  
20 *all of the following:*

21 *(1) All rights or defenses that the guarantor or other*  
22 *surety may have because the principal's note or other*  
23 *obligation is secured by real property or an estate for*  
24 *years. These rights and defenses include, but are not*  
25 *limited to, any rights or defenses that are based upon,*  
26 *directly or indirectly, the application of Section 580a,*  
27 *580b, 580d, or 726 of the Code of Civil Procedure to*  
28 *the principal's note or other obligation.*

29 *(2) All rights and defenses that the guarantor or*  
30 *other surety has or may obtain as a result of any*  
31 *election of remedies by the creditor, even though the*  
32 *election of remedies, including, without limitation,*  
33 *completion of the exercise of a power of sale*  
34 *contained in a deed of trust or mortgage that secures*  
35 *the principal's note or other obligation, has destroyed*  
36 *or has otherwise impaired any rights of subrogation,*  
37 *reimbursement, contribution, and indemnification*  
38 *that the guarantor or other surety has or may obtain*  
39 *against the principal.*

40

1 (d) Without limiting any rights of the creditor or any  
2 guarantor or other surety to use any other language to  
3 express an intent to waive all rights and defenses of the  
4 surety by reason of any election of remedies by the  
5 creditor, the following provision shall be effective to  
6 waive all rights and defenses the guarantor or other  
7 surety may have in respect of his or her obligations as a  
8 surety by reason of an election of remedies by the  
9 creditor:

10  
11 *The surety waives all rights and defenses arising out*  
12 *of an election of remedies by the creditor, even*  
13 *though that election of remedies, such as a*  
14 *nonjudicial foreclosure with respect to security for a*  
15 *guaranteed obligation, has destroyed the surety's*  
16 *rights of subrogation and reimbursement against the*  
17 *principal by the operation of Section 580d of the*  
18 *Code of Civil Procedure or otherwise.*

19  
20 (e) Subdivisions (b), (c), and (d) shall not apply to a  
21 guaranty or other type of suretyship obligation made in  
22 respect of a loan secured by a deed of trust or mortgage  
23 on a dwelling for not more than four families when the  
24 dwelling is occupied, entirely or in part, by the borrower  
25 and that loan was in fact used to pay all or part of the  
26 purchase price of that dwelling.

27 SEC. 3. Section 580a of the Code of Civil Procedure is  
28 amended to read:

29 580a. Whenever a money judgment is sought for the  
30 balance due upon ~~an obligation for the payment of which~~  
31 ~~a note secured by a deed of trust or mortgage with power~~  
32 ~~of sale upon real property or any interest therein was~~  
33 ~~given as security,~~ an estate for years, following the  
34 exercise of the power of sale in such deed of trust or  
35 mortgage, the plaintiff shall set forth in his or her  
36 complaint the entire amount of the indebtedness which  
37 was secured by the deed of trust or mortgage at the time  
38 of sale, the amount for which the real property or interest  
39 therein was sold and the fair market value thereof at the  
40 date of sale and the date of that sale. Upon the application

1 of either party made at least 10 days before the time of  
2 trial the court shall, and upon its own motion the court at  
3 any time may, appoint one of the probate referees  
4 provided for by law to appraise the *real* property or ~~the~~  
5 ~~interest therein~~ *estate for years* sold as of the time of sale.  
6 The referee shall file his or her appraisal with the clerk  
7 and that appraisal shall be admissible in evidence. The  
8 referee shall take and subscribe an oath to be attached to  
9 the appraisal that he or she has truly, honestly and  
10 impartially appraised the property to the best of his or her  
11 knowledge and ability. Any referee so appointed may be  
12 called and examined as a witness by any party or by the  
13 court itself. The court must fix the compensation of the  
14 referee in an amount as determined by the court to be  
15 reasonable, but those fees shall not exceed similar fees for  
16 similar services in the community where the services are  
17 rendered, which may be taxed and allowed in like  
18 manner as other costs. Before rendering any judgment  
19 the court shall find the fair market value of the real  
20 property; or ~~interest therein~~ *estate for years*, at the  
21 time of sale. The court may render judgment for not more  
22 than the amount by which the entire amount of the  
23 indebtedness due at the time of sale exceeded the fair  
24 market value of the real property or ~~interest therein~~  
25 *estate for years* sold at the time of sale with interest  
26 thereon from the date of the sale; provided, however, that  
27 in no event shall the amount of the judgment, exclusive  
28 of interest after the date of sale, exceed the difference  
29 between the amount for which the property was sold and  
30 the entire amount of the ~~indebtedness~~ *note* secured by  
31 the deed of trust or mortgage. Any such action must be  
32 brought within three months of the time of sale under the  
33 deed of trust or mortgage. No judgment shall be rendered  
34 *against the maker of such note* in any such action until the  
35 real property or interest therein has first been sold  
36 pursuant to the terms of ~~the~~ *such* deed of trust or  
37 mortgage, unless the real property or ~~interest therein~~  
38 *estate for years* has become valueless.

39 *SEC. 4. It is the intent of the Legislature that the*  
40 *repeal and enactment of Section 2856 of the Civil Code*

by this bill does not represent a change in, but is merely declarative of, and intended to clarify existing law. It is the intent of the Legislature that the types of waivers described in Section 2856 of the Civil Code do not violate the public policy of this state. Additionally, the Legislature, by enacting subdivisions (b), (c), and (d) of Section 2856 of the Civil Code, does not intend to address the legal requirements for waivers in a guaranty or other surety in connection with the types of transactions described in subdivision (e) of Section 2856 of the Civil Code. No inference of any kind should be drawn from the exclusion of these transactions from the application of subdivisions (b), (c), and (d) of Section 2856 of the Civil Code. The repeal and enactment of Section 2856 of the Civil Code and amendments to Section 580a of the Code of Civil Procedure made by this bill are intended to remove the uncertainty, which has been caused by the (now decertified) decision in *Bank of Southern California v. Dombrow*, (1995), regarding the adequacy and enforceability of waivers by guarantors of the types described in subdivisions (a), (b), and (c) of former Section 2856 of the Civil Code.

amended to read:

~~2856. (a) Any guarantor, including a guarantor of an obligation secured by real property or any interest therein, may waive the guarantor's rights of subrogation and reimbursement and any other rights and defenses available to the guarantor by reason of Sections 2787 to 2855, inclusive, including, without limitation, any of the following:~~

~~(1) Defenses the guarantor may have to the guaranty obligation by reason of an election of remedies by the creditor.~~

~~(2) Rights or defenses the guarantor may have by reason of protection afforded to the principal with respect to the obligation so guaranteed pursuant to the antideficiency or other laws of this state limiting or discharging the principal's indebtedness, including, without limitation, Section 580a, 580b, 580d, or 726 of the Code of Civil Procedure.~~

~~(b) Any language that expressly sets forth a waiver of suretyship rights or defenses described in subdivision (a), or any of them, shall be effective whether or not it contains references to statutory provisions or judicial decisions. The following language shall be an effective waiver of the guarantor's defense to a recovery by the creditor by reason of the creditor's election of remedies:~~

~~Guarantor waives all rights and defenses arising out of an election of remedies by the creditor, even though that election of remedies, such as a nonjudicial foreclosure with respect to security for a guaranteed obligation, has destroyed the guarantor's rights of subrogation and reimbursement against the principal by the operation of Section 580d of the Code of Civil Procedure or otherwise.~~

~~(c) Subdivision (b) shall not apply to a guaranty of a loan to an individual primarily for personal, family, or household purposes, secured by a deed of trust or mortgage on a dwelling for not more than four families when the dwelling is occupied, entirely or in part, by the borrower.~~